

1. Did claimant suffer accidental injury arising out of and in the course of his employment? Respondent contends claimant had deviated from his employment at the time of the accident.
2. Is the claim barred by operation of K.S.A. 1990 Supp. 44-501 because claimant's injuries were substantially caused by claimant's intoxication?
3. What is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the evidence and considering the arguments by the parties, the Appeals Board finds and concludes claimant's injuries resulted substantially from claimant's intoxication and this claim is, therefore, barred by provisions of K.S.A. 1990 Supp. 44-501(d).

FINDINGS OF FACT

1. Claimant worked for respondent doing construction and remodeling jobs. On November 16, 1990, claimant was working on a job he hoped to finish during the weekend.
2. In order to complete the job, claimant needed some flashing. At approximately 3 p.m., claimant left the job site to go obtain flashing from his brother-in-law, Todd Bonewell, who owned a separate construction company.
3. Claimant first went to a job site to find his brother-in-law and then to his brother-in-law's home. His brother-in-law advised he had the materials but wanted to go get something to eat first. Bonewell had a shop or warehouse where he planned to go to after they got something to eat. The shop or warehouse was also where claimant needed to go to get the flashing. Claimant, Bonewell, and Bonewell's crew went to Teddy's, a bar at Clifton and 47th, at approximately 5 p.m. They stayed at the bar until sometime around 7 p.m. Bonewell lost track of claimant and left the bar. Claimant testified his wife had paged him and he left the bar to call his wife.
4. The Board finds claimant was on his way to Bonewell's facilities for the purpose of picking up the flashing at the time of the accident. While there was reason to doubt where claimant was going at the time of the accident, the essentially uncontroverted and not improbable evidence indicates claimant was on his way to pick up flashing for use on his project.
5. Claimant does not recall his accident, but his brother-in-law Bonewell next saw claimant when claimant passed the truck he, Bonewell, was driving and one other car driven by one of Bonewell's employees, on a two lane bridge. After passing, claimant

turned back into his lane but went onto the shoulder. Claimant veered from the right shoulder back left all the way across the road and then turned back right. As he did, claimant lost control and the van rolled several times. The Board also finds that as claimant passed Bonewell, claimant was traveling at approximately 70 miles per hour. Bonewell and the other vehicle were traveling approximately 40 miles per hour.

6. In spite of testimony to the contrary, the Board finds that, at the time of the accident, claimant was substantially impaired from the alcohol he had consumed at the bar shortly before the accident, and the accident resulted substantially from claimant's intoxication. The records from Wesley Medical Center, where claimant was taken after the accident, show a blood alcohol content of .097. Timothy M. Scanlan, M.D., a family practice physician with substantial experience dealing with alcohol addiction and treatment, testified claimant was significantly impaired based on the .097 level shown in the records. Dr. Scanlan testified that claimant underestimated his alcohol consumption when claimant stated he had only two beers. According to Dr. Scanlan, two beers over the two hour period, 5pm to 7pm, would metabolize and would not produce the .097 level found. Dr. Scanlan also opined that the alcohol contributed to the accident. The Board finds claimant imbibed more than the two beers he acknowledged. This finding that claimant was significantly impaired is also confirmed and supported by several other factors. The report of accident shows alcohol as a factor in the accident. Greg Bonewell, one of the witnesses to the accident who had been with claimant at the bar, told the EMS crew to be careful what they gave claimant because there was alcohol involved. Finally, claimant's driving behavior was consistent with and tends to support the conclusion that claimant's injuries resulted substantially from his own intoxication.

7. The records from Wesley Medical Center also show a urine test was positive for THC at a level greater than 100 micrograms per milliliter. Claimant testified this was from second hand exposure. Based on the testimony of Dr. Scanlan, the Board finds this level was not produced by second hand exposure but from smoking marijuana. The evidence does not, in our view, support a finding that the marijuana substantially caused the accident. The Board concludes, however, the testimony by Dr. Scanlan does, to some degree, undermine claimant's credibility.

8. Dr. Scanlan testified without objection to the results from the blood alcohol and THC testing done at Wesley Medical Center. Claimant's counsel made other objections to Dr. Scanlan's opinion but did not make a hearsay, foundation, or other objection to Dr. Scanlan's reliance on the results from the tests in forming his opinions.

CONCLUSIONS OF LAW

1. The Board finds and concludes claimant's accident did arise out of and in the course of his employment. Claimant was authorized to purchase such materials. Claimant was also driving a company van at the time with company advertising painted on the van. Claimant had deviated temporarily but had returned to the course of his employment at the time of the accident.
2. Because there was no objection by counsel, Dr. Scanlan's opinions given in reliance on the alcohol and THC test results from Wesley Medical Center have been considered by the Board as evidence properly admitted into the record.
3. Claimant's injuries resulted substantially from claimant's intoxication.
4. Under the statutes applicable at the time of claimant's injury, an injury was not compensable if it resulted substantially from claimant's intoxication. K.S.A. 1990 Supp. 44-501(d). Claimant's application for benefits should be denied.

AWARD

WHEREFORE, the Appeals Board finds the Award by Administrative Law Judge Nelsonna Potts Barnes, dated April 4, 1997, should be, and the same is hereby, reversed. Claimant's application for benefits is denied.

IT IS SO ORDERED.

Dated this ____ day of March 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Lawrence M. Gurney, Wichita, KS
Robert G. Martin, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director

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5

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